

# Government Contracts Blog

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## **DoD Issues Proposed Rule Providing Guidance On Organizational Conflicts Of Interest**

By [John S. Tobey](#)

On April 22, 2010 the Defense Acquisition Regulation Council proposed to amend the Defense Acquisition Regulation Supplement (“DFARS”) to provide uniform guidance and tighten existing requirements for organizational conflicts of interest (“OCIs”) by contractors in major defense acquisition programs. *See* 75 Fed. Reg. 20,954 (April 22, 2010). The proposed rule implements section 207 of the Weapons System Acquisition Reform Act of 2009 (the “Act”) (Pub. L. 111-23), which directs the Secretary of Defense to revise the DFARS to provide both uniform guidance and tighten existing requirements related to OCIs to ensure that advice from contractors comes from sources that are objective and unbiased. The Act also authorizes limited exceptions to ensure that the DoD has continued access to highly qualified contractors.

To meet these directions, DoD identified four overarching considerations:

1. The proposed rule should reflect and incorporate the many concepts from decisions issued by the Government Accountability Office and the Court of Federal Claims regarding OCIs;
2. Coverage of OCIs should be better organized and relocated to a new subpart to be addressed along with improper business practices and personal conflicts of interest;
3. Standard provisions and clauses will be rendered more beneficial by enabling the contracting officer to tailor the provisions and clauses as appropriate; and
4. It is useful to expand coverage to address issues associated with task and delivery order (indefinite-delivery/indefinite-quantity) contracts.

In implementing these considerations, DoD proposes to use DFARS subpart 203.12 in lieu of the present FAR subpart 9.5. However, DoD states that it intends to revise the DFARS again after the FAR is revised to incorporate broader OCI changes to accommodate those changes. In

addition to adding 203.12, the proposed rule also makes changes to parts 202, 212, and 252.

Among the more important proposed changes:

- *202.101 Definition* adds a new definition of “organizational conflict of interest” that relies on the types of conflicts first defined in *Aetna Government Health Plans*, B-254397, July 27, 1995, 95-2 CPD ¶ 129, rather than the types of tasks, as is the case currently under FAR subpart 9.5;
- *203.1201 Definition* defines “contractor,” “firewall,” and “resolve”; importantly, “Contractor” is defined to include the contractor’s total organization including subsidiaries and affiliates, but neither “subsidiary” or “affiliate” is defined;
- *203.1202 Applicability* states the proposed rule would apply to contracts with profit and nonprofit organizations. Additionally, the rule would also apply to acquisitions of commercial items, but not to commercially available off-the-shelf (“COTS”) items;
- *203.1203 Policy* states that it is the policy of the DoD to protect its interests by identifying and resolving OCIs and that mitigation is the preferred method of resolution;
- *203.1204 Types of Organizational Conflicts of Interest* identifies three types of OCIs and organizes them by type of conflict of interest rather than type of task. The three types of OCIs are: (1) impaired objectivity, (2) unfair access to non-public information, and (3) biased ground rules;
- *203.1205 Contracting officer* consolidates the contracting officer’s responsibilities to provide better direction to contracting officers;
  - *203.1205-3 Resolution of organizational conflicts of interest* covers three methods of resolution, including avoidance, limitation on future contracting (neutralization), and mitigation. This subsection describes the methods of resolution and provides illustrative examples of each method;
  - *203.1205-4 Waiver* carries over the coverage from FAR subpart 9.5 and also makes clear that waivers should be used for residual conflicts that exist after all the techniques of resolution have been attempted to lessen a conflict; and
  - *203.1205-5 Award* requires the contracting officer to award the contract to the apparent successful offeror only if all OCIs are resolved (with limited exceptions); sets forth the specific actions a contracting officer must take if he or she determines that award should be withheld from the apparent successful offeror on the basis of an OCI; and directs the contracting officer to include a resolution plan (mitigation plan or limitation on future contracting) in the basic contract if an OCI is identified at the time of task or delivery order contract award. This section also addresses the unique OCI concerns created by task and delivery order contracts, which vary as between single-award and multiple-award

contracts. For example, 203.1205-5(d)(3) provides that for GSA Schedules and for multiple-award task or delivery orders against which other agencies may place orders, the contracting officer for the ordering agency may determine that an OCI exists and preclude award unless a government-approved mitigation plan is incorporated into the order.

- *203.1206 Solicitation provisions and contract clauses* identifies provisions and clauses that the contracting officer can tailor as appropriate. The clauses include within their scope OCIs arising in connection with procurement contracts as well as ***grants, cooperative agreements, and other transactions***; and
- *252.203-70XX Notice of Potential Organizational Conflict of Interest* imposes new disclosure obligations on the contractor including an express requirement to disclose “all relevant information regarding any organizational conflict of interest;” the new rule likely will require that companies adopt significant new procedure to track and report information related to OCIs, particularly with respect to other segments, subsidiaries, and affiliates.

If the proposed rule is adopted as proposed, contractors will benefit from clarification of OCI rules and express consideration of the OCI issues early in the award process. On the other hand, contractors will be subjected to express new data collection and disclosure requirements. One benefit of the proposed rule is that it affords more flexibility to the contractor and the agency by expressly espousing a policy favoring mitigation.

Interested parties must submit comments to the proposed rule in writing no later than June 21, 2010.

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